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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1073

GEORGE P. SHULTZ, Secretary of the Treasury, and
All Other Defendants in the District Court,
Appellants,

vs.

THE CALIFORNIA BANKERS ASSOCIATION,
FORTNEY H. STARK, JR., et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of California

MOTION TO DISMISS OR AFFIRM

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Appellees[1] respectfully move this Court to dismiss the appeal herein or, in the alternative, to affirm the

[1] "Appellees" herein are all appellees named by the Government in its Jurisdictional Statement except the California Bankers Association.

judgment of the United States District Court for the Northern District of California on the ground that it is manifest that the question on which the decision of the cause depends is so insubstantial as not to need further argument.

ARGUMENT

THE QUESTION PRESENTED IS INSUBSTANTIAL BECAUSE THE STATUTES AND REGULATIONS INVALIDATED BY THE DISTRICT COURT PLAINLY INVADE THE RIGHT OF PRIVACY OF BANK CUSTOMERS AND CONSTITUTE A MASSIVE SCHEME OF UNREASONABLE SEARCHES AND SEIZURES.

The District Court enjoined the domestic reporting requirements of the Bank Secrecy Act—the only provisions of the Act at issue herein—because they unreasonably invade the right of privacy . . . particularly the Fourth Amendment. . . ." (JS-60), and because they authorize the Secretary "to require virtually unlimited reporting from banks and their customers of domestic financial transactions as a surveillance device for the alleged purpose of discovering possible, but unspecified, wrongdoing among the citizenry. . . ." *Ibid.*

The heart of the Government's appeal[2] is that the District Court "improperly ignored the Regulations" (JS-20) that had been promulgated under the Act, forgot somehow that they had not been drafted as

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[2]Two other appeals from the same order are presently pending before this Court: *Stark v. Shultz*, No. 72-1196, O.T. 1972; and *California Bankers Association v. Shultz*, No. 72-985, O.T. 1972.

intrusively as they might have been, and therefore rendered a decision premised on "hypothetical" but unlikely contingencies.

Actually the District Court did just the opposite; it read the regulations carefully and realized that what the Government now claims are the actual limitations of the reporting requirements were themselves hypothetical because one of the regulations, 31 C.F.R. §103.45, made all the others instantly, infinitely, unreviewably expandable by the Secretary at his whim. That regulation permitted the Secretary "in his sole discretion" to "impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify" all the other regulations by simple "written order or authorization" effective immediately. That Regulation, in effect when the District Court rendered its decision, was central to its reasoning (see JS-49) and was one of the central targets of appellees' attacks. Yet in the District Court the Government did not commit one word to paper concerning the meaning or validity of that Regulation.[3] It was not until its Jurisdictional Statement in this Court that the Government even mentioned Regulation 103.45, and then only to note (JS-22, n. 19) that it had been amended to delete the portions over which the District Court and the appellees "expressed concern."

Against that background it is hardly persuasive for the Government to urge that because other Regula-

[3]The Secretary was criticized in Congress for refusing to predict how that power would be used (see 116 Cong.Rec. 16963-64 (1970).

tions then limited the domestic transactions required to be reported to $10,000 (JS 10-11) and to currency (JS 12-14) that consideration of any other application was "hypothetical".

Nor does the Government's Jurisdictional Statement explain why the domestic reporting requirements are consistent with the Fourth Amendment,[4] even assuming that they could or would be limited to cash transactions exceeding $10,000. There is nothing inherently suspicious about such transactions; their mere existence does not amount to probable cause to believe anything. Yet the statutes and regulations at issue here require the seizure of the details of those transactions simply so the Government can store up the information in case it is later needed to satisfy some undefined future curiosity. Abhorrence to such mass seizures is at the heart of the Fourth Amendment. See generally, *Stanford v. Texas,* 379 U.S. 476, 481-85 (1965); *Boyd v. United States,* 116 U.S. 616, 622-30 (1886).

The Government argues that persons engaging in such transactions do not have a reasonable expectation of privacy because "banks have been reporting such transactions for more than twenty-five years" (JS-17) under the Trading with the Enemy Act, which the Government describes (JS-15) as requiring reports of "all" currency transactions which banks

[4]The constitutional flaws in the reporting requirements that are separate from the Fourth Amendment are discussed in detail in Appellees' Jurisdictional Statement in *Stark v. Shultz,* No. 72-1196, O.T. 1972, at pp. 12-14 and 21-23; we incorporate those arguments by reference here rather than repeat them.

thought were not "commensurate with the legitimate and customary conduct of the business, industry or profession of the person or organization concerned" (JS-15). If so, then it is hard to see why Congress bothered to pass the Bank Secrecy Act, why the Government has bothered to appeal the order of the District Court (because it already has other means of getting the information it wants), or why the decision of the court below "creates a serious gap in the Bank Secrecy Act that significantly impairs the statutory scheme. . . ." (JS-9).

The answer, of course, is that the two reporting schemes are very different. Congress, claims the Government, wanted "to strengthen the statutory basis for requiring such reports" (JS-16). It wanted "more definite standards" and to eliminate "the subjectivity of the earlier regulations" (*ibid.*). The old statutory scheme permitted the banks to report or not *subjectively,* unlike the new one, and there is no evidence in this record that any substantial reporting was ever done under that subjective standard by any banks anywhere at any time. The old scheme required a judgment of whether the transaction exceeded "legitimate" business requirements, while the new one does not. In the total absence of evidence and given the obvious differences between the requirements of the Trading with the Enemy Act and the Bank Secrecy Act, the Government's assertion that these reports have been made for a quarter of a century is not only baseless, but actually contradicts the Government's expressed concern over the importance of its appeal.

CONCLUSION

The Government's appeal is insubstantial and should be dismissed or, in the alternative, the portion of the District Court's order appealed from by the Government should be affirmed.

Dated, San Francisco, California,
June 26, 1973.

Respectfully submitted,

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